Ready Mix USA, Inc. *and* International Union of Operating Engineers, Local 320. Case 10–CA–32872

October 24, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On January 18, 2002, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] and to adopt the recommended Order as modified.[3]

The judge found that the Respondent is a *Burns*[4] successor and that it violated Section 8(a)(5) and (1) by failing and refusing to recognize and bargain collectively with the Union, on its demand, 3 days after the Respondent had purchased the assets of the predecessor's operations. In its exception, the Respondent claims, among other things, that because of significant changes in the management and overall corporate structure of the business, its predecessor's historical combined unit of ready-mix batch plant and concrete block plant(hereafter "batch plant" and "block plant" respectively) employees no longer remains an appropriate unit. We find no merit in the Respondent's exceptions.

Factual Background

Southern Ready-Mix of North Alabama, Inc. (SRM), the predecessor to the Respondent, Ready Mix USA, Inc., operated three facilities: a block plant in Florence, Alabama, and batch plants in Florence and Sheffield, Alabama. The Florence plants were located within the same complex, and the Sheffield plant was located a few miles away.

The Union, Operating Engineers Local 320, had an established collective-bargaining relationship with SRM for at least 20 years. Employees in these facilities had been included in a single bargaining unit for at least 8 years. The most recent collective-bargaining agreement was agreed on on December 17, 2000,[5] and was due to expire sometime in 2003. At the time this agreement was reached, the Respondent's employees at the Florence and Sheffield facilities were in the bargaining unit represented by the Union.

On or about December 18, the Respondent purchased the assets of SRM at its Florence and Sheffield locations. The Respondent offered employment to all former SRM unit employees at these locations. After the Respondent commenced operations at these facilities on December 19, the former SRM employees continued working in the same locations as they had under SRM. They performed the same work, using the same equipment and under mostly the same supervisors, and produced the same product, which was sold to many of the same customers as before the sale. The Respondent did provide some different benefits than SRM to the batch plant and the block plant employees, such as health and dental insurance benefits.

Three days after the sale, by letter dated December 21, the Union requested to meet and bargain with the Respondent. By letter dated December 29, the Respondent declined to recognize the Union, citing the fact that the 39 former SRM unit employees it hired made up less than 50 percent of Respondent's *total work force* of approximately 800 employees.

Analysis

The test for determining successorship under *Burns* and its progeny is well established:

> An employer, generally, succeeds to the collective-bargaining obligation of a predecessor if a majority of its employees, consisting of a "substantial and representative complement," in an appropriate bargaining unit are former employees of the predeces-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In the sentence immediately preceding fn. 31 in her decision, the judge inadvertently referred to how changes by the Respondent in terms and conditions of employment would impinge on "union membership" rather than on unit employees, the correct focus. We correct this error.

[3] We have removed the name of the Respondent's predecessor "SRM" from the unit description in the judge's Conclusions of Law and the Order. We have also deleted the name of the Sheffield plant from the unit description in the affirmative section of the bargaining order, because the Respondent has closed that facility. The closing of the Sheffield plant, which occurred prior to the filing of the original charge, was not alleged in the complaint to be unlawful, either as to the decision or its effects, nor was it litigated as such by either the Union or the General Counsel during the hearing. Accordingly, the unit is now appropriately limited to employees at the remaining Florence facilities.

We shall substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB No. 29 (2001).

[4] *NLRB* v. *Burns Security Services*, 406 U.S. 272 (1972).

[5] All dates are in 2000, unless otherwise indicated.

> sor and if the similarities between the two operations manifest a "'substantial continuity' between the enterprises." *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 41–43 (1987).

Van Lear Equipment, Inc., 336 NLRB 1059, 1063 (2001) (finding single-facility unit appropriate in successorship context). We find that the judge correctly applied this test to the facts here.

First, we agree that the Respondent failed to show that changes it made in the operations of the newly acquired facilities made representation of the block plant employees and the batch plant employees in a single unit no longer appropriate.[6]

It is well recognized that "long-established bargaining relationships will not be disturbed where they are not repugnant to the Act's policies. The Board places a heavy evidentiary burden on a party attempting to show that historical units are no longer appropriate."[7] Indeed, "compelling circumstances are required to overcome the significance of bargaining history."[8] The Respondent failed to meet that burden here.

The Respondent operates separate divisions for its batch plants and its block plants. After the Respondent acquired the SRM facilities, it placed the Florence block plant in its block division and the Florence and Sheffield batch plants in its ready-mix division. These divisions have separate managerial hierarchies but are served by a common human resources director, Nikki Youngstrom. Prior to the Respondent's acquisition of the SRM facilities, Robert Coffey served as general manager over these facilities and Leland Preston served as operations manager over them. After the acquisition, the Respondent retained both Coffey and Preston, although it is not clear what role the Respondent assigned Coffey. Preston served as manager of at least the batch plant operations. The Respondent contends, and we accept for purposes of analysis, that immediately after its acquisition of the SRM facilities, it placed the block plant under the immediate supervision of Gene Sears, who was a general manager at one of the Respondent's other block plants.[9]

These changes, however, fall far short of meeting the heavy evidentiary burden of showing that the historical batch and block plant bargaining unit is no longer appropriate. While the Respondent's administrative structure and managerial hierarchy are, no doubt, important to the Respondent and are different from those of SRM, they are far less important to the unit employees, who, at and after the time of the Respondent's acquisition of the former SRM facilities and the Union's bargaining demand, were by and large doing the same jobs in the same locations and under the same working conditions and mainly the same supervision as before the acquisition. Additionally, the Respondent's provision of somewhat different benefits to the batch plant employees than to the block plant employees and the change of the manager over the block plant would do little to disrupt the employees' community of interest in their historical bargaining unit.

The Respondent emphasizes the differences in the operations of the batch plants and the block plant and argues that they make the unit inappropriate. However, the difference in the nature of block plant operations and batch plant operations existed when these facilities were owned by SRM as well as under the Respondent's ownership. Thus, such differences cannot constitute a change that renders the formerly appropriate single bargaining unit inappropriate. Moreover, there is nothing inherently inappropriate in including batch plant employees and block plant employees in a single unit. Bargaining units that include both types of employees previously have been found appropriate. See *Rinker Materials Corp.*, 294 NLRB 738 (1989); *Allen Materials, Inc.*, 252 NLRB 1116, 1118 (1980). Further, as the D.C. Circuit has noted, "[i]n most cases, a historical unit will be found appropriate if the predecessor employer recognized it, even if the unit would not be appropriate under Board standards if it were being organized for the first time."[10]

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[6] We also agree with the judge, for the reasons she stated, that the Respondent failed to show that the employees in the newly acquired facilities were an "accretion" to employees employed at the Respondent's other facilities.

[7] *Banknote Corp. of America, v. NLRB*, 84 F.3d 637, 647 (2d Cir. 1996), quoting *Banknote Corp. of America*, 315 NLRB 1041, 1043 (1994) (internal quotes omitted).

[8] *Mayfield Holiday Inn*, 335 NLRB 38, 39 (2001), quoting *Children's Hospital*, 312 NLRB 920, 929 (1993), enfd. sub nom. *California Pacific Medical Center v. NLRB*, 87 F.3d 304 (9th Cir. 1996) (internal quotes omitted).

[9] The supporting evidence that the Respondent immediately placed the block plant under different supervision is somewhat uncertain. William Holden, president of the Respondent's block division, testified that the Respondent did not want to keep the former SRM block plant under Preston's management because "block is more specialized than that." Holden further testified that, immediately after the December 18, 2000 acquisition, the Respondent sent Sears to the former SRM block plant "to kind of help figure out mechanically what we needed to do with the plant to get it refurbished . . . and then at the same time, we were interviewing for a block plant manager to actually manage the block facility." The Respondent hired Tom Snelling for this position in February or March 2001, according to Holden. When asked who was responsible for management of the block plant prior to Snelling's arrival, Holden testified that "we started refurbishing the plant, and Gene Sears was really responsible to me, and I told him to make sure they were producing at least a few block."

[10] *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 118 (D.C. Cir. 1996). Contrary to the Respondent's contention, the historical bargaining unit here is not entitled to less deference simply because it was not certified by the Board. *Trident Seafoods, Inc.*, 318 NLRB 738, 739 fn. 5 (1995), enfd. in pertinent part 101 F.3d 111 (D.C. Cir. 1996).

Finally, although the Respondent contends that it planned for future consolidation at the time that it acquired the Florence and Sheffield facilities, the Respondent had no definite plan for changes at the time of the purchase. Thus, among other things, no final decision had been made to close the Sheffield facility or to consolidate operations. The Respondent's president and owner, Marc Tyson, testified that the decision whether to close the Sheffield batch plant was left to General Manager Hathorn. It was not until February or March 2001 that the Sheffield batch plant was closed. Almost all of the unit employees at this facility were transferred to the Florence batch plant.

In contending that its operational changes rendered the prior bargaining unit inappropriate, the Respondent relies on *Security-Columbian Banknote Co*.[11] However, that case offers little support to the Respondent's position. There, the employer purchased a printing plant and hired 8 of the 12 plant employees who together had performed both letterpress and offset work in a single bargaining unit. The employer immediately made structural changes in the bargaining unit, physically placing four of the employees into a separate offset department to perform offset work and placing the other four into a letterpress department to perform solely letterpress work. The Board found that the prior bargaining unit remained appropriate because it found that the changes to it, on which the employer relied in refusing to recognize the union, were undertaken for an unlawful motive. The court of appeals reversed, holding that the Board's finding was not supported by substantial evidence.

The circumstances in the present case are markedly different. Here, after the Respondent's acquisition of the former SRM facilities, the unit employees in those facilities continued to perform the same work that they had done previously. They were not subdivided into more specialized departments and assigned only certain specialized work. While some unit employees worked in the block plant and others worked in the batch plant operations, this division of work was no different than it had been previously when they were working for SRM. Thus, in the present case, there were no changes like those in *Security-Columbian*.

Further the Board's finding of a violation in *Security Columbian* was based in large part on the fact that the changes there were unlawfully motivated under Section 8(a)(3). The court reversed the Board on the issue of motive, and found that the changes rendered the prior unit inappropriate. By contrast in the instant case, our conclusion (that the changes were insufficient to change the unit) rests on its own facts. It is not dependent on any 8(a)(3) finding. Indeed, there is no such finding. In *Security-Columbian*, the court never ruled on whether the changes to the unit that occurred there were sufficient to render it no longer an appropriate unit. Rather, the court merely held that the Board's finding of unlawful motive, on which the Board had relied in its unit finding, was unsupported by the record. Thus, the court's decision does not speak to the issue of the magnitude or character of change that may render a bargaining unit no longer appropriate. For all these reasons, we find that the court's decision in *Security-Columbian* provides scant support for the Respondent's contention that the bargaining unit here is no longer appropriate.

Having found that the unit remained appropriate, we next turn to whether a majority of the Respondent's employees at the facilities it acquired from SRM were former SRM employees, whether the employees at these facilities constituted a substantial and representative complement, and whether there was substantial continuity in the operations before and after the Respondent's acquisition of the former SRM facilities.

As noted above, at the time that the Union requested recognition, the majority—indeed, perhaps all—of the Respondent's employees at the former SRM facilities had previously been employees of SRM in the unit represented by the Union. Additionally, there was a substantial and representative employee complement at that time, as the Respondent had offered employment to all the SRM employees at these facilities and operation of the facilities continued uninterrupted. Finally, as discussed above, there clearly was substantial continuity of operations, as the Respondent continued to operate its predecessor's facilities in essentially an unchanged manner from the time of the purchase on December 18 through the Respondent's refusal to recognize the Union on December 29 and thereafter.

Accordingly, we adopt the judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Ready Mix USA, Inc., Florence, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a):

"(a) Failing and refusing to recognize and bargain in good faith with the International Union of Operating Engineers, Local 320 as the exclusive collective-bargaining

[11] *NLRB v. Security-Columbian Banknote Co*., 541 F.2d 135 (3d Cir. 1976).

representative for its employees in the below-described bargaining unit:

> All production and maintenance employees employed at the Florence and Sheffield plants, except supervisors as defined by the National Labor Relations, Act, as amended, professional and technical employees, watchmen, and guards."

2. Substitute the following for paragraph 2(a).

"(a) On request, meet and bargain with the Union as the collective-bargaining representative of its employees in the following unit concerning terms and conditions of employment and, if agreement are reached, embody the agreement in signed agreement:

> All production and maintenance employees employed at the Florence plants, except supervisors as defined by the National Labor Relations, Act, as amended, professional and technical employees, watchmen, and guards."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. October 24, 2003

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize and bargain collectively with the International Union of Operating Engineers, Local 320 in good faith as the exclusive bargaining representative of our employees in the following appropriate unit:

> All production and maintenance employees employed at the Florence and Sheffield plants, except supervisors as defined by the National Labor Relations Act, as amended, professional, technical employees, watchmen and guards.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the International Union of Operating Engineers, Local 320 and put in writing and sign any agreement reached on terms and conditions of employment of our employees in the following appropriate unit:

> All production and maintenance employees employed at the Florence plants, except supervisors as defined by the National Labor Relations Act, as amended, professional, technical employees, watchmen and guards.

READY MIX USA, INC.

Katherine Chahrouri, Esq., for the General Counsel.
Jay St. Clair, Esq., of Birmingham, Alabama, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. The original charge in Case 10–CA–32872 was filed on March 31, 200l, by International Union of Operating Engineers, Local 320 (the Union). A complaint issued on July 27, 2001, alleging that Ready Mix USA, Inc. (the Company), violated Section 8(a)(1) and (5) and 8(d) of the Act by failing and refusing to bargain collectively and in good faith with the Union.

A hearing on these matters was conducted before me in Florence, Alabama, on October 29, 2001. Thereafter, the General Counsel and Respondent filed briefs. Based on all of the evidence of record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The company is an Alabama corporation, with offices and places of business in Florence, Alabama, and formerly Sheffield, Alabama, where it has been engaged in the operation of ready-mix batch plants and a concrete block plant. During the 12 months preceding issuance of the complaint, the Company purchased and received goods valued in excess of $50,000 directly from suppliers located outside the State of Alabama. The Company admits, and I find that it is an employer engaged

in commerce within the meaning of Section 2(6) and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Union entered into a collective-bargaining agreement (CBA) with Southern Ready-Mix of North Alabama, Inc. (SRM), on October 1, 2000,[1] covering all SRM production and maintenance employees employed at the Florence and Sheffield plants with the exception of supervisors, professional and technical employees, watchmen, and guards. The 2000 CBA was effective from October 1, 2000, until September 30, 2003.[2] SRM consisted of a ready-mix cement and concrete block operation in Florence, Alabama, and a ready-mix operation in Sheffield, Alabama. The ready-mix product is described as cement whose ingredients are weighed by a computer and loaded into trucks at a dispatching location,[3] with the cement being mixed in the rotating drum of the truck while in transit to the location where it will be unloaded and used by the customer. Concrete blocks are completely manufactured at the block facility and stored until transported by truckdrivers to customers.

On or about December 18, 2000, the Company purchased assets from SRM, including, but not limited to, the ready-mix concrete plant in Florence, Alabama, the block plant in Florence, Alabama, and the ready-mix concrete plant in Sheffield, Alabama. Union Business Agent Danny Williams testified that the Company did not advise the Union either by letter or telephone of any change in ownership of the employer. Williams recalled that on December 17 or 18 he went to the SRM offices to meet with SRM's general manager, Bobby Coffee. Williams explained there had been some minor conflict on the insurance portion of the agreement. Once this section was resolved, Williams and Coffey signed the contract. After the contract was signed, Williams mentioned to Coffey that he had heard some rumors about a possible sale of the company. Coffey acknowledged that it was possible that the company could be sold, but stated that he did not foresee any changes in the company's relationship with the Union.

Williams subsequently learned about the sale of the company from bargaining unit employees. After consulting with the Union's legal representative, Williams sent Coffey a letter, requesting to meet and bargain with the new employer. By letter dated December 29, 2000, the Company responded to Williams through its attorney, Jay St. Clair. In his December 29, 2000 letter, St. Clair explained that at the time of purchase, the Company employed approximately 800 production employees. Subsequent to the purchase of SRM's assets, 39 of SRM's former production employees were offered employment with the Company. St. Clair further stated that since former SRM employees make up less than 50 percent of the production work force of the Company, and since a majority of the Company's production employees were not employed within the bargaining unit, the Company had no bargaining obligation with the Union.

B. The Company's Evidence on the Alleged Obligation to Recognize and Bargain with the Union

1. Prior to the acquisition

Company President Mark Tyson testified that he started the company in 1995 with the purchase of four ready-mix plants in Alabama. As Tyson continued to purchase concrete plants, he organized the plants into divisions. The divisions were determined by the plants' proximity to each other. As concrete can last no more than 1-1/2 hours in a cement truck before it begins to harden, Tyson organized the divisions by the distance of the trucks driven on a daily basis. In 1998, the Company purchased Blue Star Ready Mix with facilities in seven Alabama towns, including Florence, Alabama. Blue Star also operated a concrete block plant in Sheffield, Alabama. The company continued to purchase additional facilities that were added to its Blue Star Division.[4]

On September 18, 2000, the Company bought ready mix and block plants previously operated by APAC.[5] The Company also created Block USA, a separate block division in September 2000. Tyson testified that a separate division was needed for the block plants because there is a different customer base than the concrete divisions.[6] Tyson further explained that he created the separate division as a means of financially tracking the two operations. The Company maintains that in the fourth quarter of 2000, Tyson began to organize Block USA into regional divisions with its own president and financial statement.

2. The acquisition

Tyson knew a union represented the employees of SRM at the time he purchased SRM's assets. Tyson explained that although he had previously purchased unionized plants, he consulted his attorney as to how to decide whether the currently unionized plants would be union or nonunion. Tyson testified that he was advised that "if it's an intermingled company, where it goes back and forth, the larger of the two is what prevails." Tyson further explained, "So it was kind of a no

[1] Business Agent David Freeze testified that SRM and the Union had a long bargaining history, resulting in a series of collective-bargaining agreements. Freeze participated in negotiating CBA's with SRM in 1992 and 1997. While the Union did not produce any copies of earlier agreements, Freeze estimated there were a number of members who had as many as 20 years in the pension plan. Former Business Agent Danny Williams testified that seven or eight members of the bargaining unit had 25 to 26 years in the pension plan. In its brief, the Company argues there is no evidence that the Board ever certified the Union as a bargaining representative, or that there was ever any administrative or judicial determination that the bargaining unit was appropriate.

[2] Although the beginning date of the CBA was October 1, 2000, the agreement was not executed in final form until approximately December 17, 2000.

[3] The ready-mix operations are also referred to in the record as "batch plants" or "concrete plants."

[4] The Company retained the name of the former company as its division name.

[5] Tyson described this purchase as the Company's largest acquisition of block plants.

[6] Tyson explained that the concrete divisions serve the general contractors directly while the block plants sell to the individual masons.

brainer. I mean, we've done it before in several locations, the same thing, and really never had a question." Tyson admitted that he never made any attempt to contact the Union about the change in ownership and the change in the collective-bargaining relationship. Tyson recalled, "What I did was, I went—I enjoy meeting the employees, and go to each one. I met with all of them, and the union was never mentioned one time. So I assumed they didn't care."

On the purchase of SRM, the Company offered employment to all of the former SRM bargaining unit employees. The Company distinguishes however, that SRM block plant employees were offered employment with the Block USA division and SRM's concrete employees were offered employment with the Company's Blue Star division. The operations of the Florence and Sheffield facilities continued without interruption. Tyson testified that the Company immediately hired employees in all classifications needed to run the Florence and Sheffield operations, with the possible exception of a yardman at one facility.

3. After the acquisition

The Company asserts that in December 2000, the Alabama/Florida Division of Block USA was created and the block plant acquired from SRM became a part of that division. In January 2001, the Company shut down its previously acquired Sheffield block plant and moved the employees to the newly acquired Florence block plant. In March 2001, the Sheffield concrete plant was also closed. Tyson testified that the Sheffield plant was closed because of its proximity to the Tuscumbia plant and two plants weren't needed for that same geographical area. Tyson maintains that at the time the Company acquired the assets of SRM, there was a plan as to whether all the plants would continue to operate. Tyson stated that the plan was definitely to shut down either the Tuscumbia or Sheffield concrete plants and he left the decision to Wendell Hathorn, general manager and vice president of the Blue Star division.

C. General Counsel's Evidence on the Company's Obligation to Recognize and Bargain

Thomas Bradford began working for SRM in 1995. Until December 2000, he was a truckdriver at the Sheffield ready-mix operation.[7] He first learned of the sale of the Company from a letter on SRM letterhead, dated December 22, 2000. Despite the change in ownership, Bradford's employment was not interrupted or changed during December. Bradford confirmed that there was not even a day of interruption between the change in ownership from SRM to the Company. When the Company later closed the Sheffield concrete plant in March 2001, Bradford was transferred to the Tuscumbia plant. Bradford testified that from the time that the Company hired him on December 22, until his transfer in March 2001, his daily job functions did not change. His uniform remained the same and he continued to drive the same truck. The equipment that he used remained the same, as did the sold product. Bradford confirmed that the customers to whom he delivered cement were "basically the same." The concrete dispatcher, Leland Preston, remained the same, as did the general manager, Bobby Coffey. Bradford did not change the way that he reported to work, clocked in, or received his work assignment. While the letterhead changed on the forms he used, the paperwork related to the job was the same as with SRM.

Bradford testified that other than being told that the "block" employees were considered to be under a different division, there was no actual change in the identity or number of his coworkers during the time of the change in ownership. Bradford estimated that prior to December 2000, there were 35 to 38 employees in the bargaining unit at Sheffield. When the Company acquired the facility in December 2000 employees were hired into the same classifications that existed prior to the acquisition.

Johnny Corum began working for SRM in 1993. His job at SRM was in maintenance, which included responsibility for facility and machine maintenance at the Florence and Sheffield facilities. Corum was a job steward and also served on the Union negotiating committee for the 2000 contract. Corum first learned of the change in ownership at the Company's meeting with employees in December 2000. During the meeting, the Company explained the new benefits to employees and required all of the employees to complete employment applications. Corum recalled there was no interruption in work caused by the change in ownership. He testified that he worked for SRM one day and the Company the next day.

Corum testified that there was little change in his work after the Company's acquisition. Corum's uniform remained the same, as did his supervisor. The equipment used by Corum and the manufactured product remained the same. Corum's assigned truck did not change and he continued to use the same paperwork and timecards. Corum recalled no difference in the procedure for work assignments. After the change in ownership, Corum continued to report to the same workplace and perform the same work. In January he was told that he would continue to do the same maintenance work that he had previously performed.

Thomas Bradford testified that when employed by SRM, he occasionally loaded concrete out of facilities other than Sheffield, such as Cullman and Birmingham. He also recalled that prior to December he occasionally loaded out of the SRM Florence plant. After the sale he could recall only one time when he loaded out of a different facility and that was when he volunteered to help load product from Tuscumbia. Corum also testified that while he was an SRM employee, he occasionally helped out at the block plant in Florence. He has also performed work at the Company's other block plants when needed.

D. Analysis and Conclusion

In *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), the Supreme Court upheld the proposition that a mere change of employers or of ownership of an enterprise did not mean that the new employer had no obligation to bargain with its predecessor's employees. In the circumstances of that case, and where "the bargaining unit remained unchanged and a majority of employees hired by the new employer are represented by a certified bargaining agent, the Court found a duty to bargain on

[7] Bradford also served as job steward at the Sheffield facility and on the Union's negotiating committee for the 2000 contract negotiations.

the part of the new employer. The doctrine was further refined in the Court's holding in *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987). In *Fall River Dyeing*, supra, the Court explained that where an 8 (a)(5) violation is alleged in the context of an employer assuming the operations of a predecessor employer, the General Counsel must demonstrate both the majority status or constructive majority status of the union in an appropriate unit, and a "substantial continuity" between the employing enterprises. In following the direction of the Court, the Board has found the threshold test for determining sucessorship is: (1) whether a majority of the new employer's work force in an appropriate unit are former employees of the predecessor employer; and (2) whether the new employer conducts essentially the same business as the predecessor employer.[8]

1. The Company's argument

The Company argues that when SRM owned the concrete block manufacturing plant and the two ready-mix concrete loading facilitates, it might have made sense to have these operations in one bargaining unit, because SRM operated them as one business unit. The Company contends that it operates these facilities in a totally different manner. In citing *P.S. Elliott Services*,[9] the Company asserts that "critical to a finding of sucessorship is a determination that the bargaining unit for the predecessor employer remains appropriate for the 'successor' employer. The Company also contends that when a purchaser organizes former bargaining unit employees into separate departments or divisions, under separate management, a previously recognized bargaining unit is no longer appropriate, citing *NLRB v. Security-Columbian Banknote Co*., 541 F.2d 135 (3d Cir. 1976). Citing *P.S. Elliott*, supra, the Company also contends that a bargaining unit can also become inappropriate when a purchaser integrates the acquired assets into a larger operation, such that the newly hired employees "do not have a community of interest sufficiently distinct and separate from the Respondent's other employees to warrant the establishment of a separate appropriate unit."

In its brief, the Company makes the argument that the unit proposed by the General Counsel is inappropriate for two reasons. First, the proposed unit consists of both block plant and ready-mix concrete employees. Relying on Tyson's testimony, the Company asserts that these are different products, with different manufacturing techniques, different customers, and they are operated totally separate from each other. The employees working at the block plant have their own managers and have different benefits and handbooks from the ready-mix concrete employees. The Company asserts that at the time of purchase, it was management's intent to operate concrete and block plants differently and under separate corporate divisions. William Holden, president of Block USA testified that he has no authority to set terms and conditions of employment for the ready-mix operation. Wendell Hathorn, vice president and general manager of Blue Star Ready Mix Division, testified that he has no authority to set terms and conditions of employment at the block plant.

The Company also argues that the proposed unit consists of only two of the ready-mix concrete loading facilities in the Blue Star Ready Mix Division. It is argued that the Sheffield plant, which had been acquired from SRM, is no longer in operation. The Company asserts that the employees at the loading facility, which is still in operation, do not have a community of interest distinct from the other employees in the Blue Star Ready Mix division.

Counsel summarizes by stating that the proposed unit is thus, too inclusive, in that it includes block plant employees, and too exclusive, in that it does not include the ready-mix concrete operations into which the acquired assets have been integrated.

2. General Counsel's argument

Counsel for the General Counsel asserts that it is undisputed that the Company purchased all of the SRM assets. It is further undisputed that the majority of employees hired by the Company were former SRM bargaining unit employees, and that there was no interruption in operations. General Counsel argues that regardless of what was going on in the heads of Tyson and his management team, the fact is that there was very little to no change in operations at the time the Company refused to recognize and bargain with the Union on December 29, 2000. The Union had the assurance of Bobby Coffey,[10] given just moments after executing a new collective-bargaining agreement, that the purchase of SRM by the Company would not change the bargaining relationship.

General Counsel argues that to show accretion, a successor company must overcome the presumption that "a new facility's unit is separately appropriate for bargaining." In rebuttal to the Company's argument that the former SRM employees were accreted into larger multilocation ready mix and block divisions, the government argues the validity of the historical bargaining unit is not destroyed by a mere designation on a set of organizational charts. General Counsel submits that as of December 29, the Company failed to show that there was sufficient interchange of former SRM employees with employees of the Company's larger divisions, which rendered the existing unit, invalid.

3. Analysis

The Company asserts that it has no bargaining obligation to the Union, relying on its analysis of the numbers. Tyson contends that it was a "no brainer" as the majority of previously unrepresented employees outnumber the previously represented employees. The company argues the employees previously employed by SRM were simply accreted into the larger unrepresented unit and the former SRM employees no longer constituted an appropriate unit. Certainly, the SRM employees appear to be outnumbered by the total number of employees employed by the Company in its various concrete and block facilities in Alabama, Arkansas, and Florida. The Company introduced documentation to show its acquisition of 15 block plant

[8] *GFS Bldg. Maintenance, Inc.*, 330 NLRB 747 (2000), *Sierra Realty Corp*., 317 NLRB 832 (1995).

[9] 300 NLRB 1161, 1162 (1990).

[10] Coffey worked for SRM as general manager over their North Alabama Division prior to December 2000 and continues to be employed by the Company.

facilities in 1998 and 2000. The Company also submitted documentation of its current ownership of seven divisions of concrete production in Florida and Alabama. Each division is shown to include multiple facilities. If the SRM employees are properly accreted into the Company's total work force of unrepresented employees, the *Burns* prerequisite of a majority in the new unit is not met and there is no obligation to recognize and bargain with the Union.

a. Whether accretion into the larger unit is appropriate

The Board continues to define accretion as simply the addition of a relatively small group of employees to an existing unit where these additional employees share a sufficient community of interest with the unit employees and have no separate identity. See *Judge & Dolph, Ltd.*, 333 NLRB 175 (2001). The Board has traditionally looked to a number of evidentiary factors to determine the appropriateness of accretion. The relevant factors include:

> (a) the degree of operational integration between the additional employees' plant and the preexisting unit's plant(s), including such facts as employee interchange and contact among the employees of the different plants;
>
> (b) similarities in the skills, functions, interests and working conditions of the employees in the different plants; proximity of the plants;
>
> (c) their bargaining history, and;
>
> (d) the degree of common supervision and control.[11]

Although accretion may be appropriate in some circumstances, the Board has acknowledged the process fails to accord employees any representational choice and has followed a restrictive policy in its application.[12] Because the Board seeks to insure employees' rights to determine their own bargaining representative, the Board has been cognizant that employees accreted to other bargaining units are denied any kind of self-determination election.[13] Accordingly, the Board has traditionally been reluctant to find an accretion, even where the resulting unit would be appropriate, in those cases where a smaller unit, consisting solely of the accreted unit, would also be appropriate and the Section 7 rights would be better preserved by denying the accretion.[14]

The Company argues that accretion is appropriate in this case because the SRM bargaining unit employees were hired as either block plant employees or ready-mix concrete employees. The Company relies on its having two distinct upper level managers for these two groups of employees. As a further means of showing that block and concrete employees have different community of interests, the Company points to different benefit plans offered to block and concrete employees. The Company also submitted into evidence a listing of dates when employees hired from SRM worked out of plants not acquired from SRM in support of its argument of interchange among employees. Additionally, the Company submitted a list of dates when employees who were not hired from SRM loaded out of plants acquired from SRM.

Certainly, a variance in supervisory structure and differences in compensation and benefits are factors which would weigh in favor of distinguishing concrete and block employees into separate and distinct bargaining units. Frequent interchange of the SRM employees with employees not previously employed by SRM would also weigh in favor of accreting SRM employees into a larger unit of similarly classified employees. Despite these factors which may appear to be favorable to the Company's argument of accretion, I do not find the total record evidence supportive of such accretion.

The Company asserts that, as president of Block USA, William Holden has no responsibility for management of the employees working in ready-mix concrete. Conversely, the Company argues that the vice president and general manager of the Blue Star Ready Mix Division has no responsibility for the block plant employees. In its brief, the Company argues that when SRM employees were offered jobs to Block USA, they met with Holden, Safety Director Allen Frank, and Nikki Youngstrom, human resources director for Block USA. President Tyson testified that when the company had been smaller, each of the division's general managers served as human resources. Tyson further explained, "Once we got as large as we are, we[15] had a girl named Nikki Youngstrom that works directly for me, and she helps—I actually asked her to prepare this.[16] She helps me oversee everything." Based on Tyson's testimony, it is apparent that human resources for all the company, including both concrete and block divisions, is handled by Youngstrom under Tyson's direction.

As apparently prepared by Youngstrom and listed in Respondent's Exhibit 11, there appear to be differences in the handbooks covering the ready mix and concrete employees. I note however, the Company arbitrarily assigns the handbooks and benefits based on the division into which employees are hired. There is, of course, no evidence that any of the benefits contained therein were obtained by the employees based on bargaining by a designated representative or by any community of interest other than that asserted by the Company. In *Empire Health Center Group*, 314 NLRB 677, 680 (1994), the employer argued accretion after a merger. The employer based its argument in part on the fact that the two groups of employees in issue shared the same wage and benefit structure after the merger. The Board found such argument to beg the question. The Board specifically noted that the employees only shared the same wage and benefit structure because the employer refused to bargain with the union and unilaterally imposed such benefits and wages.

The Company relies on its evidence of employee interchange as a significant basis for accretion. The records submitted by the Company cover a period from January 10, 2001, through August 31, 2001. A review of these records reflect that over

[11] *Super Valu Stores*, 283 NLRB 134, 136–137 (1987).
[12] *Dennison Mfg. Co.*, 296 NLRB 1034, 1036 (1989).
[13] *Gitano Distribution Center,* 308 NLRB 1172 (1992).
[14] *Kaynard v. Mego Corp.*, 633 F.2d 1026, 1030 (2d Cir. 1980).

[15] January 10 is the first date recorded for a SRM employee to work out of a plant not acquired from SRM.

[16] In his testimony, Tyson referenced R. Exh. 11, which is a summary comparing the different handbooks for block and concrete employees.

the course of this period of time, there were instances when former SRM truckdrivers loaded trucks out of facilities that had not been acquired from SRM. The records however, do not reflect a high frequency of such occurrences during the first 3 months of 2001. While employee Jerry Parrish unloaded from a non-SRM facility on six occasions prior to April 2001, employee Michael Dawson did so only once. When employed by SRM, Thomas Bradford worked out of the Sheffield facility. He continued to work out of the Sheffield facility until his transfer to Tuscumbia in March 2001. The Company's records reflect that on January 27 Bradford loaded out of the Tuscumbia plant. In March there were 3 days when Bradford loaded out of the Florence Industrial Park facility or the Tuscombia facility. Bradford testified that when employed by SRM, he had occasionally loaded concrete out of facilities other than Sheffield.[17] I am more persuaded by Bradford's testimony that from the time he was hired by the Company on December 22, 2000, until his transfer in March 2001, the way he did his job on a day-to-day basis did not change at all. His truck, his uniform, and the basic paperwork remained the same. The equipment that he used as well as the product he delivered did not change. The customers to whom he delivered remained "basically the same." Bradford confirmed that his lead man remained unchanged, as did the concrete dispatcher and the general manager.

The Board has continued to affirm a longstanding concept that "the issue of whether a group of employees constituted an accretion to an existing bargaining unit must be determined on the facts that existed on the date of the union's demand." *Brooklyn Hospital Center*, 309 NLRB 1163 (1992), *GHR Energy Corp*., 294 NLRB 1011, 1052 fn. 37 (1989), and *Gould, Inc*., 263 NLRB 442, 446 (1982). The Company argues that when it acquired SRM's assets, it did so with an intention to close facilities and make changes and the record reflects that it did implement closings and transfers of employees later in 2001. General Counsel argues that despite the Company's intentions and reorganization by paperwork, the relevant time period in this matter is the time of the union's demand. I agree. The Company argues that it was delayed in making many of its intended changes because of the inclement weather in December 2000.[18] Even allowing for the fact that bad weather adversely affected the Company's concrete production, this factor does not sufficiently alter the overall facts to find an accretion appropriate. Despite a slowing of business activity in December, it is the date of the Union's demand, made 3 days after the sale, which determines the relevant period for assessing accretion and the appropriateness of the bargaining unit previously recognized by the predecessor employer. While the overall business activity may have been reduced at the time of the Union's request for bargaining, the degree of change of the work process for the SRM employees remains the critical factor.

It is apparent that under current Board law, accretion is found only when the employees sought to be added to an existing bargaining unit have little or no separate identity and share an overwhelming community of interest with the preexisting unit to which they are accreted.[19] The Board and the Courts have recognized that in evaluating community of interest, "the overriding policy of the Act is in favor of the interest in employees to be represented by a representative of their own choosing for the purposes of collective bargaining."[20] Tyson testified that the employees never mentioned the Union when he met with them and he "figured they didn't care." Whether employees did or did not mention the Union, they had previously chosen and enjoyed the benefits of a collective bargaining representative of their own choosing. Their having done so is a fundamental Section 7 right that cannot be summarily disregarded. As noted above, the Board has followed a restrictive policy in finding accretions to existing units because employees accreted to such units are not accorded a self-determination election and the Board seeks to insure the employees' rights to determine their own bargaining representative. Normally this issue is before the Board when employees are accreted into a represented bargaining unit and the accreted employees are thus[21] denied the opportunity to select their representative because of the accretion. The Board has, however, dealt with the issue of accretion when it results in curtailing bargaining for a previously represented group, rather than the addition of employees who had never voiced a preference with respect to collective bargaining. In such a case, the Board has clearly stated, "In such circumstances, Board policy appears to shift its attention in the direction of the forceful policy encouraging stable bargaining relations, with freedom of choice and the accretion doctrine relegated to lesser standing. Thus, the right of an employer to terminate a bargaining relationship, totally, or in substantial part, and thereby to deny contractual benefits has been viewed restrictively." See *Seven-Up/Canada Dry Bottling Co.*, 281 NLRB 943 (l986).

It is undeniable that accretion will not be applied where the employee group or groups sought to be added to an established bargaining unit is so composed that it may separately constitute an appropriate unit.[22] As discussed above, I do not find a valid basis for an accretion of the SRM employees into the Company's larger unit of concrete and/or block employees.

b. Whether the SRM employees constitute an appropriate bargaining unit and the significance of the bargaining history

At hearing and in its brief, the Company asserts its reliance on *P.S. Elliott Services*, 300 NLRB 1161, 1162 (1990), for its position that the SRM bargaining unit is no longer an appropriate unit for the Company as a successor employer.[23] In that

[17] He recalled facilities in Cullman and Birmingham as well as SRM's Florence facility.

[18] Blue Star Division Vice President Hathorn testified that for the period from December 18 to January 18 was not a typical business period for pouring concrete. Both Hathorn and Tyson explained that rain and temperatures below 40 degrees Fahrenheit affect pouring concrete. The Company also submitted records to show the daily temperatures for the month of December.

[19] *Safeway Stores*, 256 NLRB 918 (1981).

[20] *Meijer, Inc. v. NLRB*, 564 F.2d 737, 743 (6th Cir. 1977).

[21] *Gourmet Award Foods, Northeast,*, 336 NLRB 872 (2001).

[22] *Hersey Foods Corp*., 208 NLRB 452, 458 (1974), enfd. 506 F.2d 1052 (3d Cir. 1974).

[23] In a recent case, the Board reiterated that critical "to a finding of successorship is a determination that the bargaining unit of the prede-

case, the Board found seven employees who performed cleaning services at a single office building no longer constituted an appropriate bargaining unit after they were hired by a larger cleaning firm and subsumed into a work force of 175 employees. I find it significant to note that in *P.S. Elliott*, the work locations of the large cleaning firm were not geographically distant from each other and the cleaning firm also assigned other employees to the building at which the seven employees worked. In the case at hand, the Company argues that the SRM concrete employees now share a significant community of interest with all of the Company's other concrete employees. The Company's Exhibit No. 3 demonstrates this community of interest would stretch over seven divisions in two states. Although the Company argues there is frequent interchange, the Company's own records reflect that there was sporadic and minimal interchange of the concrete truckdrivers during the first three months after the Company's purchase of SRM's assets. At the time of the Union's demand, there was no interchange.

Fundamental to the question of whether the SRM bargaining unit remains appropriate is the consideration of its historical existence. With regard to the appropriateness of a historical unit, the Board has a longstanding policy that a mere change in ownership should not uproot bargaining units that have enjoyed a history of collective bargaining.[24] The only basis for doing so would be if the unit no longer conforms reasonably well to other standards of appropriateness. *Indianapolis Mack Sales & Service*, 288 NLRB 1123 fn. 5 (1988). The party who challenges a historical unit bears the burden of showing that the unit is no longer appropriate and the evidentiary burden is a heavy one. In *Children's Hospital of San Francisco*, 312 NLRB 920, 929 (1993), the Board noted that "compelling circumstances" are required to overcome the significance of bargaining history. In *P.J. Dick Contracting*, 290 NLRB 150, 151 (1988), the Board further explained that units with extensive bargaining history remain intact unless repugnant to Board policy.

Despite the Company's assumption that employees didn't care about the Union, I believe that it is the bargaining history and the employees' perspective that holds paramount importance. In *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 41–43 (1987), the Supreme Court identified the following factors as relevant when looking at the issue of substantial continuity between the predecessor and the successor:

> [W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products and has basically the same body of customers.

The Court went on to note that these factors are assessed primarily from the perspective of the employees. In quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973), the Court emphasized that when analyzing a successorship issue "the Board keeps in mind the question whether 'those employees who have been retained will understandably view their job situations as essentially unaltered.'" The Board has further added that by requiring the party challenging a historical unit to show the unit is no longer appropriate, the Board recognizes the importance *Fall River* places on the employees' perspective in a successorship analysis.[25]

As in *P.S. Elliott*, the Company would subsume the SRM employees into a larger unit composed of its other ready-mix concrete and/or block plant employees as the more appropriate unit or units. As recognized by the Board however, the issue in a successorship situation is not whether a previously unrepresented unit is appropriate, but whether a historically recognized unit is no longer appropriate. *Trident Seafoods, Inc.*, supra; *Brown & Root, Inc*., 334 NLRB 628 (2001). It is especially noteworthy that this is a situation where the parameters of this group have been established. General Counsel has demonstrated that the group of employees proposed for accretion by the Company can be considered to be a separate appropriate unit. *Honeywell Inc*., 307 NLRB 278 (1992).

In a recent case the Board affirmed the administrative law judge's decision in a case in which the respondent employer became the employer for employees of 15 different companies involved in the ready-mix concrete industry.[26] Two of the employee groups of the predecessor were represented by two different unions and covered by collective-bargaining agreements. The respondent was a subdivision of a multinational conglomerate with numerous divisions. As in the present case, the respondent hired a majority of the predecessor's employees in the represented bargaining units. At the time of their hire, the employees were informed of changes in working conditions including insurance, wages, and pensions. The respondent argued that only a unit that included all of the former employees of the 15 companies would be appropriate.[27] The judge noted however, that the true issue is not whether the overall unit would be appropriate, but whether the former bargaining units continue to be appropriate after the sale to the respondent. The judge also noted that the respondent used the same employees, with the same equipment, to supply the same product to the same customers; and hiatus was not an issue. As in the present case, there was testimony by employees that they continued to perform the same work, with the same product, using the same equipment, out of the same locations for the same customers as before the sale to the respondent. The respondent argued the larger bargaining unit was more appropriate because there was intermingling of duties and personnel between the former units. As in the present case, there was some evidence that the concrete truckdrivers had previously picked up loads of concrete from facilities other than the one where they were employed. The judge found that the only notable difference in the way

cessor remains appropriate." *Banknote Corp. of America*, 315 NLRB 1041 (1994).

[24] The Company argues that it is significant that there is no evidence of the Union's having been certified as the bargaining representative for the SRM employees. I do not find the lack of an election to be a fatal flaw. A union's majority status may be established by means other than a Board election. *Mine Workers v. Arkansas Oak Flooring Co*., 351 U.S. 62, 71–72 (1956).

[25] *Trident Seafoods, Inc.*, 318 NLRB 738 (1995).

[26] *Pioneer Concrete of Arkansas, Inc.*, 327 NLRB 333 (1998).

[27] There had been one owner for all of the 15 companies.

respective bargaining unit employees were treated by the respondent after the sale as opposed to the way they were treated before the sale, were changes they were told about when they were hired. The Board affirmed the judge's finding that the respondent's bargaining obligation commenced on the dates when it hired a majority of its employees in their former bargaining units.

Despite the Company's assertions that block and concrete employees have a separate community of interest because of different employee handbooks, insurance plans or separate fiscal accounting records,[28] I nevertheless find that the Company continues to operate the business of the predecessor in essentially unchanged form.[29] The former SRM concrete employees are still delivering ready-mix concrete and block employees are still manufacturing concrete blocks. The jobs do not differ from the jobs in existence before the sale and I find nothing in the record that warrants a finding that the former SRM unit is repugnant to Board policy. *Brown & Root,* supra. The evidence is simply not sufficient to demonstrate "compelling circumstances" sufficient to overcome the significance of the bargaining history in this case. *Mayfield Holiday Inn,* 335 NLRB 38 (2001), *Van Lear Equipment,* 336 NLRB 1059 (2001).

c. The Company's bargaining obligation

As outlined above, the Board and courts look at a number of factors in evaluating whether there is "substantial continuity" between the enterprise of a successor employer and the predecessor to trigger a bargaining obligation for the successor. Fundamental is the concept that the factors must be viewed from the employees' perspective, that is, whether their job situations have so changed that they would change their attitudes about being represented. *Derby Refining Co.*, 292 NLRB 1015 (1989). When the Union sought recognition from the Company, the SRM employees were working in the same facilities, performing the same work, using the same equipment, under essentially the same supervisors, and producing the same product which was sold to many of the same customers as before the sale. As in *Derby Refining Co.*, supra, the change in ownership was not of such an unusual circumstance as to affect the employees' views on union representation. The Board has previously found a violation of Section 8(a)(5) when an employer refused to bargain in a similar successorship situation.[30] In finding an obligation to bargain, the Board noted that the employer continued to use the same facility, the same machinery, the same methods of production, the same product, and a continuity of the work force. Contrary to the circumstances of the present case where there was no hiatus, a hiatus of 2-1/2 months occurred between the predecessor's operation and that of the successor. In *EPE, Inc.*, 284 NLRB 191 (1987), it was noted that while the successor made changes after the sale, the changes did not bring about either a discontinuity of either employment or production.

The Company argues that it has aligned the concrete and block employees separately under different upper level corporate managers and that it maintains a separate fiscal accounting system for these processes. It appears however, that the essential inquiry governing the question of the Company's successorship is whether its basic operations, as they impinge on union membership, remain essentially the same after the transfer of ownership.[31] General Counsel argues that, but for the corporate organizational chart designations to which only highest management were privy, the only changes which predated the December 29th refusal to recognize and bargain were (a) the plants were brought under new ownership, and (b) a team of high level managers planned other aspects of consolidation in the future. General Counsel further submits that the employee witnesses stated unequivocally that from their perspective, their situations had not changed. I find General Counsel's argument persuasive.

Based on the entire record, I do not find a basis for the prior SRM employees to be accreted into a larger unit of concrete and/or block employees employed by the Company. At the time of the Union's demand for recognition, the Company employed a majority of the predecessor's workforce in an appropriate unit and continued, without interruption or substantial change, the predecessor's business operations.[32] Accordingly, I find that the Company has violated Sections 8(a) (1) and (5) of the Act when it refused to recognize and bargain with the Union.

CONCLUSIONS OF LAW

1. Ready Mix USA, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Operating Engineers, Local 320 is a labor organization within the meaning of Section 2(5) of the Act.

3. The Company has engaged in conduct in violation of Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the International Union of Operating Engineers, Local 320 as the exclusive collective-bargaining representative of its employees in the appropriate unit:

> All SRM production and maintenance employees employed at the Florence and Sheffield plants, except supervisors as defined by the National Labor Relations Act, as amended, professional and technical employees, watchmen, and guards.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6), (7), and (8) of the Act.

[28] While the Company seeks to distinguish the block employees and concrete employees because of different top level management, I do not find this to be compelling evidence of distinction. President Tyson admitted that the same individual assists him in the ultimate human resources functions for both concrete and block employees. Additionally, I note that a respondent may not escape its obligation as a successor by employing different supervisors. *Sierra Realty Corp.*, 317 NLRB 832, 835 (1995).

[29] *Torch Operating Co.*, 322 NLRB 939 (1997).

[30] *Inland Container Corp.*, 275 NLRB 378 (1985).

[31] *Electrical Workers IUE v. NLRB*, 604 F.2d 689, 694 (D.C. Cir. 1979).

[32] *NLRB v. Burns Security Services*, supra; *Fall River Dyeing Corp. v. NLRB*, supra.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. As I have found that the Company has illegally failed and refused to recognize and bargain with the Union, I shall order the Company to recognize the Union as the exclusive collective-bargaining representative of its employees in the above-described unit and, on request by the Union, meet and bargain in good faith.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[33]

ORDER

The Respondent, Ready Mix USA, Inc., Florence, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain in good faith with International Union of Operating Engineers, Local 320 as the exclusive collective-bargaining representative for its employees in the below-described bargaining unit:

> All SRM production and maintenance employees employed at the Florence and Sheffield plants, except supervisors as defined by the National Labor Relations, Act, as amended, professional and technical employees, watchmen, and guards.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, meet and bargain with the Union as collective-bargaining representative of its employees in the described appropriate bargaining unit concerning terms and conditions of employment and, if agreements are reached, embody the agreements in signed statements.

(b) Within 14 days after service by the Region, post at its facilities in Florence and Sheffield Alabama, copies of the attached notice marked "Appendix."[34] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Company's authorized representative, shall be posted by the Company immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed a facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since December 29, 2000.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 18, 2002

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain collectively with the International Union of Operating Engineers, Local 320 in good faith as the exclusive bargaining representative of our employees in the following appropriate unit:

> All SRM production and maintenance employees employed at the Florence and Sheffield plants, except supervisors as defined by the National Labor Relations Act, as amended, professional, technical employees, watchmen, and guards.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL, on request, meet and bargain with the International Union of Operating Engineers, Local 320 and, if an agreement is reached, embody all agreements in signed statements.

READY MIX USA, INC.

[33] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[34] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."